THE McCARDLE CASE

n that which this case affords. What is he feet which now tread the halls of this ation have made their last journey and the voices v abloud are forever silent. But though the part ich the har bear in this transaction is far inferior nd forever in the jurisprudence of the d. In approaching the argument of so great a se, it is of the first importance to exclude from it very extraneous or disturbing element. We should of the hour into a serener air, with a wider horizon ith the struggle for office, with the rise or fall of arties, with the policy of President or Congress, we ave nothing to do. Within the walls of this of justice we look only to the law revent our taking care that the independence of the ch and of the bar is not menaced; or, if that hapher because one of the counsel saw fit to say that was the duty of counsel to admonish the court. Admonition of what? Of impeachment, because you differ from Congress upon a constitutional question; of packing the court at some future time; of enacting that two-thirds or three-fourths of the whole shall be necessary to decide a case; or excluding the Court from their chamber? Admonition from whom? We know that the President has none to give; he ns it. We know the counsel are deputed by pretary of War. Is it admonition from the War? If I did not know that my worthy friend the Secretary of War is barricaded in his wn office, from which he dare hardly issue, I should think this more serious. Admonition from Congress? I have the highest respect for the members who exeute the function of legislation for this country; but ney are representatives, all of them, of States or ople; and when I reflect that from the great States New York, New Jersey, Pennsylvania and ority of the people, the admonition comes with less force than it might otherwise have. But as a penlant to this admonition we are told that this court is not a co-ordinate department of the government. ot a co-ordinate department of the remment? Is there any department co-or-dinate with Congress? This is the first time, certainly, when it has been suggested in this court that the judicial department was not co-ordinate with either of the others. And certain I am that in the great convention where sat the conscript fathers who made this constitution such an idea never entered. For I find at the beginning in the of the convention, that "it is the opinion of this compiltee that a national government ought to be shed, consisting of a supreme legislative, excutive and judiciary," Turning to the comments of e great founders of the government, I find in the

I shall undertake to show, in the next place, that miless this department is so far connected and islended as to give to each a constitutional control over the others, the degree of force which the maxim equires as essential to a free givernment can never to be practice duly maintained. It is evident that in reference to each other neither of them ought to posses, directly or indirectly, an overruling influence is the administration of their respective powers. It is evident that it is not a many active, and that it should be effectually restrained room passing beyond the limits assigned. After assigning the powers as they should be, the ext and most difficult task is to provide some problition against the invasion of the prerogatives of ne one by the other. Will it be sufficient to define aboundaries of each and trust to their forbearance gainst the encroaching spirit of each against the ther? Experience shows that it is necessary to prode some adequate protection of the weaker against

"Federalist," the forty-eighth number, this remarksle exposition, written as if with the spirit of pro-

me adequate protection of the weaker aga asion of the more powerful.

citizen of Mississippi, in October, 1867, was cought before a military commission and put upon tary ormers and advice to the electors not to or how to vote, upon certain public questions. was not in the army or navy; he was not imsed with a military character; and the question you to decide is, whether, under our govern citizen, a mere civilian, can be subjected to military al, under the authority of the federal government. The trial is defended upon the authority of the three acts of Congress usually called the Military Reconshaction acts. And the question, therefore, is, the supreme law of this land. If they are, our great forefathers made a charter of government intended to last for all generations of such a character that within eighty years after its adoption that federal government to which the States-originally sovereign and independent—surrendered a portion of their power can take upon itself the government of a State and govern it by the army alone. That is the question which in this last resort is brought before the supreme judges of the land. And the principal guestion hinges upon the preamble to the original act and the first and third sentences, which I will now proceed to read:-

now proceed to read:—

Whereas no legal State governments or adequate protoction for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisimua, Florida, Texas and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established; therefore.

Be it enacted, &c., That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter provided, &c.

And after providing for the assignment of an effective state of the control of the

And after providing for the assignment of an officer of the army to the command of each district the act proceeds in the third section thus:-

That it shall be the duty of each officer assigned as That it shall be the duty of each officer assigned as a foresald to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence; to punish or cause to be punished all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take juristion of and to try offenders; he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

There is the preamble and here is the conclusion. I deny both. I deny that the preamble is true in a constitutional sense, or as a justification for assuming the government of a State; and I deny that if the preamble be true in every one of its parts, it justifies

preamble be true in every one of its parts, it justifies this government for these military statutes.

I propose to call attention to these questions in

their reversed order; to this first, whether, if it be true that there is no local State government in Miselssippi and no adequate protection for life and property, it be competent for the Congress of the United States to take into its hands the whole government of the State and carry it on by the military power plone? If that authority exists it must be found in the constitution; it cannot be found anywhere else. This is a limited government. No power can be ex-This is a limited government. No power can be excreted except that which is granted expressly or by pecessary implication. Then, I say, where is the authority for this military government? It is not expressed in any one of the eighteen subdivisions of the eighth section of the first article, that which contains an enumeration of the powers of Congress. Is it implied in any one of them? I ask, where is the power under these eighteen sub-divisions of the eighth section for Congress to take upon liself the government of a State, because there is no legal State government or because there is no adequate protection for life or property? There is none whatever. You cannot find it, nor is it implied in any one of them; but if it were implied, from any one of the powers granted—that Congress, under any circumstances, could take upon itself the government of a State, it could not govern it by the military power, for the reason that that mode of government is expressly prohibited by the constitution. The argument is as short as it is conclusive. Congress can never, in the exercise of any granted powers, or for the purpose of attaining an object, no matter how good or destrable, use a prohibited means. This is so elementary that perhaps I ought not to spend any time in discussing it. But the argument on the other side was aimost entirely made up in this way; the end is good, and Congress may use any means that it pleases.

Immediately following the eighth section, to which I have just referred, containing the eighteen subdivisions of granten power, are several prohibitions, as, for example: Congress hall pass no act of attainler, no ex post facto law, nor suspend the writ of habeas corpus, except in case of insurrection or invasion.

To illustrate, suppose there was no legal State govercised except that which is granted expressly or by

don. iliustrate, suppose there was no legal State gov-

Musissippi.— I ask whether any larver will say that congress could pass an act of this tenor, whereas there is no State government in Musissippi, and it is totally discognalized; and whereas the coultain the marked of this tinion depends upon the reconstruction of the tinion of the country of the country

ing insurrection is, under the act of Con

the is therefore on trial for a capital crime. Secondiy, inciting insurrection is, under the act of Congress, an iniamous offence because it subjects the offender to imprisonment in the State prison. The court are aware that an act was passed July 17, 1862, by which inciting insurrection is made punishable by imprisonment for a period not exceeding ten years, or by fine not exceeding \$10,000. Whether, therefore, there be or be not a legal State government in Mississippi, and whether or not there be adequate protection for life and property, the petitioner could not be subjected to military trial, being a civilian, because of these prohibitinos.

But we are told Mississippi is not a State, and, therefore, the argument does not apply. Mississippi not a State, it is within the United States. It is within the State, it is within the United States. It is within our famins, and the prohibition of the constitution extends aver every foot of sell where the flag of the country floats, from Massachusetts to Texas. You may go to the Western States, and it is there your protection; you may go into the mountain districts between us and the Pacific, and it is there a protection; in California it covers you with its shield; you go northward toward the pole to far Alaska, and it is just as much a protection there as here.

In the case of Dred Scott vs. Sanford, 19 Howard, page 449, there is the following emphatic language of the Chief Justice delivering the opinion of the court:—

But the power of Congress over the person or property of a

go northward toward the pole to lar Alaska, and it is just as much a protection there as here.

In the case of Dred Scott vs. Sanford, 19 Howard, page 449, there is the following emphatic language of the Chief Justice delivering the opinion of the court:—

But the power of Congress over the person or property of a clizace can never be mere discretionary power under our constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the constitution itself. And when the territory becomes a part of the United States the federal government enters into possession in the character impressed provers over the citizen strictly defined and limited by the constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and set as a government and soveredgity. It has no power of any kind beyond it, and it cannot when it enters a territory of the United States put off its character and assums discretionary or despots power, which the constitution states the government and the citizen both enter it under the authority of the constitution, with their respective right edined and marked out, and the federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

Let it not be said of this opinion that the case of Dred Scott has been so much censured that its authority is weakened. This is the judgment of the court, delivered by the Chief Justice, and concurred in by six of his brethren. The two dissenting opinions of Mr. Justice Niclean and Mr. Justice Curtis use similar emphatic language. The opinion of Mr. Justice McLean and Fr. Justice Curtis use similar emphatic language. The opinion of Mr. Justice McLean and Fr. Justice Curtis and property of purchasers of the public lands or of communities who have been annexed to the Union by conquest or purchasers of the popularity of the constitution of all federal powe

Story, he d

In short, there is not a dissenting opinion anywhere from the doctrine that a trial of divilians for crime cannot only be by jury; and whereas it is for an infamous crime it can only be on presentment or accusation by a grand jury. That binds the United States and all its departments conjoined. For let it be understood that the government of the United States means all the departments, and not one. Congress is not the government any move then this court.

of the Reconstruction acts fall to the ground. Here is a military government, based upon military courtemartial and military trials, and enforced by military arrests. Congress has not chosen to intervene except by the sword and by the army; its judges are men with epaniettes; its sheriffs are soldiers with bayonets; and its scaffold is the green sward, with a squad of soldiers upon it.

Here, if the court please, as I have said before, I think this argument ought to end. For the question is whether McCardie, being a cittzen of Mississippi, under the dominion of the United-States—whether Mississippi be regarded as a State or not—can be subjected to a military trial which involves his imprisonment or his life, no matter under what pretence or for what end, under the authority of the government of the United States.

But I now proceed to the second step in this first part of my argument; and I say, suppose he could—that is to say, suppose that the preamble true! Is there no legal State government in Mississippi? Or rather, was there not on the 2d of March, 1887? And was there, or not, at that time, adequate protection for life and property? Now, I deny that the preamble is true in a constitutional sense. Of course, I am not going into any question of veracity, nor into any question of reacting nor into any question of veracity, nor into any net is true in a constitutional sense. Of course, I am not going into any question of veracity, nor into any question of fact, except what the court judicially know. Two facts are stated and should be separately considered:—First, that there is no legal State government in Mississippi; and second, that there is no adequate protection for life or property. There may be a legal State government which does not adequately protect life or property; so that the two questions may be most conveniently considered separately.

adequate protection for life or property. There may be a legal State government which does not adequately protect life or property; so that the two questions may be most conveniently considered separately.

Was there a State government on the 2d of March, 1867? Antecedent to that is the question whether the declaration of Congress is conclusive. To test this let me suppose a case. Suppose Congress were tomorrow to pass an act with this preamble:—Whereas there is no legal State government in the State of Massachusetts, it shall, therefore, be made a military district, and subject to the military authority of the United States, and the district commander shall have power to do what is provided in this act. Would you accept that as absolute verity? Yes, says one of the counsel; it would be an abuse of power; but if Congress were to enact it you could not contradict it. Is that so? Is it true that under this government of ours, it is possible for Congress to declare that a State in this Union, the State of Massachusetts, has not a legal government, and therefore can be subjected to military power? I deny it altogether. What authority has Congress to declare whether or not a State has a legal or illegal government? I am not now discussing the question whether it is or not republican. That is not the pretence in this preamble; they do not say that the government of Mississippi is not republican; but they say it is not legal. Now, I ask where has Congress the power to say she has not a legal government? What do you mean by "legal" Legal, according to what law?—federal law or State has a legal government? Take my State, and where has Congress the power to say she has not a legal government? What do you mean by "legal means according to some law. Mr. Justice Nelson knows that the constitutional conventions that made those changes; and he will remember that the opinion of the supreme Court of the State was takeh on the question whether the convention to frame the present constitution was constitutionally called, and they

Now, laying aside the declaration of Congress as of no constitutional force, though entitled to great respect because coming from one of the departments of the government—leaving that aside, as not authoritative, I ask you to consider whether or not the government of Mississippl was a legal government on the 2d of March, 1957. The original act declares that there is no legal State government, then, as matter of fact. "And all interierone, under color of State authority, with the exercise of military authority and that active the exercise of military and provided that the citizens may have provisional governments only until they shall be entitled to representation. There is, then, a provisional governments is still more explicit. The first section of that act speaks of "the governments then existing in the rebel States of Virginia, North Carolina, &c., as not legal State governments," They are existing governments, be it understood. There is no doubt about that. They were de facto governments of the rebel States. The State of Mississippi had at the time a de facto government, which was exercising all the functions of government, such any provided the fellow of the two volumes of the reports of the highest court of Mississippi had at the time of the rebellion, excepting the time when it was taken by the federal army, and that forbade the courts to assemble. And in this lais volume is a decision upon the question whether or not they had a legal government; that is to say, whether the government adopted under the provisional governor was a legal State government. Now, if, according to the doctrine of the decide on

marchical everything there is said to be renture to refer to a case in the last volu-

disally this intervention for the government of Mis-disalppi by military power; and, in the second slace, going back to the preamble, that is not true in a constitutional series. Before I was on, however, in order to avoid possible insapprehension, let me say that I keep always a latinction between the military power as master of place, going back to the preamble, that is not true in a constitutional sense. Before I pass on, however, in order to avoid possible misapprehension, let me say that I keep always a distinction between the military power as master of the civil power, or as subordinate to the civil. I am arguing against military power as master, and nothing else. I maintain, and I hope successfully, that whatever may be the truth of the preamble, military power, as the master of the people and of the State, cannot be imposed by the government of the United States; that consequently this preamble, whether true or not, does not justify the statutes. But my learned friends go further and suggest other reasons, as they have supposed, for these military governments. Now, I ask, in the first place, is the citizen permitted to go beyond an act of Congress to find reasons for the act? Congress has said in their act, that whereas no legal State governments exist, and no adequate protection for life or property, therefore be it enacted, &c. Confining myself to that, I say that, standing alone, that preamble does not justify that act. But my learned friends have departed from that, and say, virtually, that the preamble does not state half the case; there are other reasons which justify the act. To these other reasons I must ask your attention. First, if will consider some of the reasons generally given in debates, though not specially urged by the other side. I propose, therefore, to consider the reasons generally given for the military acts, and then the reasons given by the counsel who have argued the case. As to the reasons generally given, there are four. First, it is said that Congress has the right to quarantee a republican form of government. The claim is made of a right to intervene in Mississippi, have forfeited all their rights, and we can, therefore, do with them as we will; third, that as trattors they have forfeited all their rights, and we can, therefore, do with them as we please; fourth, they say we are government as made o

same being now. In existence—and no more justifies the claim to intervene in the government of a State for any other purpose than for the purpose of creating an emperor.

In the appendix to my brief I have printed extracts from the journal of the debates, as given by Mr. Madison in the convention of 1737, in respect to his power. It was at first broached in the convention by Mr. Randolph, who proposed it in this form, "That a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be granted by the United States to each State."

Afterwards it was attered:—"That a republican constitution and its existing laws ought to be guaranteed to each State by the United States." And finally it was amended and adopted in the form in which we have it. In the forty-third number of the Federalist, written by Mr. Hamilton, is his exposition of this power, from which it appears that this purpose and no other—to guarantee the States against monarchical or aristocratical innovations. Who would have thought that in eighty years from the time when the constitution was adopted this guarantee clause would have been a pretext for forcing upon the States the most radical innovations in the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention, ratified by the States, and expounded by the convention of the year 1867 the Congress of the United States seizes upon that clause as their authority for forcing upon the States composing the Union against aristocratical and monarchical innovations.

Now, in the year 1867 the Congress of the United States seizes upon that clause as their authority for forcing upon the States composing the Union against aristocratical and

authority to decide it. Congress has no power to decide that the government of New York is not legal, except in the case of its being not republican. Therefore I say there is no authority in Congress to decide that the existing government of any State is not legal. Consequently the deciaration has no force. Still less has Congress any right to decide whether or not there is adequate protection to life or property in the State of New York. Congress has no power to intervene if there be not adequate protection, and consequently it cannot decide anything in regard to

a written constitution. Therefore, whoever maintains the integrity of this constitution sacred and inviolate against all opposers maintains for himself and his posterity freedom and a cominon country.

Next, we are told that we can govern the Southern States by the right of conquest. This right of conquest is the ground upon which the first counsel put it. The right of war is the ground upon which the last placed it. "We have conquered the people," says the first. "It is well for them to know what is the temper of the North," he says in conclusion. "They are conquered, and we are the conquerors, and we will give them such a government as we choose." Is this argument a sound one? How have we conquered the Southern States? In the sense in which the word conquest is used in this argument we have conquered the rebel armies, thanks be to God, and there is not a hostile force, there is not a hostile hand raised against us from ocean to ocean. But does that operate to transfer the sovereignty from the conquered to the conqueror? Is the conquered sovereign displaced, and the conquering sovereign seated in his place? Mississippi was a sovereign before, in a qualified sense. The United States were sovereign before in a qualified sense. The United States were sovereign before in a qualified sense also. But when the United States overcame the rebel armies did they succeed to the sovereignty of Mississippi?

As between nations, in barbarous times, the laws of war justified the reduction to slavery of a vanquished people; but in the progress of civilization, and under the influence of Christianity, these laws have been softened down, and that practice is no longer considered lawful; on the contrary, decisions establishing the public law of the world affirm that the conquest of one nation by another makes no change in the internal relations of the people; that the respita effect does not occur in civil war. The law of conquest, in short, has no application to a civil war. There, when the sovereign subdues a rebellion he is re

numerous authority, under the constitution, has no such power.

Now, it is very true that the rebels, renounced, their alegiance. They repudiated the federal tie; but we, on the contrary, maintained the federal tie. We fought the war on the doctrine that they could not renounce it; that they were still subject to the constitution and laws; and having fought the war upon that theory it does not lie in us to say at the time of the conquest that we take the other position.

Look, if you please, at the alarming consequences of adopting a contrary doctrine. Suppose that at the time of Shay's insurrection in Massachusetts the insurgents had got the better of the State government, and the United States had been called in to put down the insurrection, would that justify the United States

time of Shay's insurrection in Massachusetts the insurgents had got the better of the State government, and the United States had been called in to put down the insurrection, would that justify the United States in assuming the government of Massachusette? Suppose that in the war with Great Britain Mississippi or any seaboard State should be conquered by Great Britain and afterwards be retaken by the United States forces, is it supposed that we then succeed in the government as a conqueror of Mississippi? Do we not restore the ancient sovereignty, and govern, as before, by our antecedent Fight?

Look abroad and see the consequence of an attempt, in a constitutional country, to govern, after the suppression of a rebellion, by the right of conquest. Look at Ireland, where for ages England had asserted her right to govern by the law of conquest, and the consequence is that the Irish people haven on thing but a feeling of intensest hate of the English rule and of the English people.

In the memorable trial of Lord Strafford before the House of Lords, where Fym, the great statesman of that day, was one of the managers of the impeachment, Strafford claimed a right to govern as he had in Ireland because the people of Ireland were a conquered people. Let me show you what was the answer of Fym to that argument. I read from the remarkable book of Goldwin Smith, just published, "Three English Statesmen—Fym, Cromwell and Pitt." Here is what he says:—

To the charge of arbitrary government in Ireland Strafford pleaded that the Irish were a conquered nation, They were a conquered nation, they were a conquered nation, and fruitful muricanent that the word is a conquered nation of the pleaded that the Irish were a conquered nation, they were a conquered nation of the pleaded that the Irish were a conquered nation, they were a conquered nation of the pleaded that the Irish were a conquered nation, they were a conquered nation of the pleaded that the Irish were a conquered nation of the secure of the pleaded that the Irish were

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the government of Mississippi. I need not add to what I have aiready argued that if Congress had any such right it could not exercise it by the military power.

The next reason given for the military government of Mississippi is that the rebel States and their people forfeited their rights by the rebellion. That is the language. The people of Mississippi and the State of Mississippi have forfeited all their rights. That is to say, they are outlaws. How have they forfeited their rights? Have they forfeited their rights? Have they forfeited their rights? Have they forfeited their rights it is osay, by the mere act of renouncing their allegiance? Most certainly not. They have denied the right of the federal government to keep them in the Union. But does that result in the loss of our right? It is not so in the case of private contracts. One cannot be absolved from a contract without the consent of the other party. Does war produce these results? If war exists, then they are levying war against the United States. But levying war is treason. Have they forfeited their rights by treason? Undoubtedly, after conriction. Though every man in Mississippi were gullty of treason, not one could be touched by an act of Congress, except upon conviction; because, as you know, Congress, except upon conviction; becau

without conviction. Still less can they pass an act against the whole people. Besides, I might add that treason is a personal orime. The people may be guity of it; but the State, as a great corporate body, is not, and cannot be.

The next reason given for governing Mississippl by military power is belligerent right. They say they have the right to assume the government of Mississippl by virtue of those rights. The first answer to that argument is this:—There can be no belligerent rights where there are no belligerents; and they are no belligerents, because the war is ended. There are no belligerents, because the war is no beltum. That is the first answer. The next is, that during war, fagrants betto, it was not competent for the government of the United States to assume the government of a State which it occupied with its forces. Let me ask your attention to this for a few moments. What could the United States do by virtue of their belligerent rights? They could wage war as other wars are waged; they could ravage and kill; could fight the armies of their enemies and capture cities; could make assauts upon forts and subdue them. But could they govern? That is to say, could they take into their own hands the government of a State which they had succeeded in ecupying with their forces? I am not now asking what they could do when waging war; but I am supposing that they have occupied the whole State of Mississippl, so that there is not a hostile hand raised in the State, and that they are carrying on their hostile operations beyond the State. I deny that they had thus the power to assume the government of Mississippl to themselves. What right has an army of a sovereign, occupying his own territory, when every hostile force is subdued, to take into its own hands the government of the country by a right paramount to the antecedent right? Suppose, however, they say—and this is the way in which the argument is put—suppose that there is utter anarchy; suppose that he had a succeeded in every hostile force is no law, nor

that it results that no other state has a right to intervene.

But, we I said, this is, after all, but a speculative discussion; it is one that does not enter into this case at all, and one which I should not have entered upon if I had had the opinion just read by Mr. Chief Justice Nelson, where that most revolutionary government of the confederacy is said to have been a government de facto, with all its departments, legislative, judicial and executive, having every part of the government in full operation. If that is so, then the states that composed it had the same, and Mississippi was among the rest. They had de facto governments, with all their departments, and the argument from the necessity of assuming the government on ments, with all their departments, and the argument from the necessity of assuming the government on account of utter anarchy is one that has no foundation whatever. But one of the learned counsel says these de facto governments were not governments de fure, because they had not taken the oath of allegiance to the United States. Let us look at that, I admit they were not governments de fure in any federal sense, for they had renounced their allegiance. They could not send members to Congress. They had legislatures not acknowledging featly to the United States, and for that reason they could not send members to Congress. They had legislatures not acknowledging featly to the United States, and for that reason they could not send members to the House of Representatives. But is it true that because they had thrown off their allegiance all their acts of legislation were Buil? Look at Mobile; is every act of the City Council of Mobile since the war began a nullity? When did the Virginia Legislature resolve not to take the oath of allegiance to the United States? How long ago? Before the war, I believe. Has not Virginia been a legal State governments. Not only would the consequences follow which I have indicated with regard to the City Council of Mobile, but the constitution. Now, if such is the consequence, as I have indicated, there has been no lawful judge upon the bench in the South since the war began; and there has been no judgment which is not a nullity from 1861 to 1864. Is that so? Is any man in his senses prepared to assert that?

But the doctrine of hostile occupation in a war has

from 1861 to 1864, is tent soy is any man in his senses prepared to assert that? But the doctrine of hostile occupation in a war has no application in a civil war, for the same reason that the doctrine of conquest has no application to a civil war; the greater includes the less. For the occupation being only for a temporary cause, it can certainly operate no further than when it is for a permanent cause.

certainty operate no further than when it is for a permanent cause.

Let me refer you to a few authorities. One of them is a citation from Haileck in his work on international law, page 304, section 29, in which he says:—"In the civil war between Cassar and Pompey the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists who have commented on this transaction agree that the debt was not legally discharged; first, because in a civil war there could be, properly speaking, no occupation; and second, because it was a private and not a public debt."

"in a civil war," says Phillmore, "there could be "in a civil war," says Phillmore, "there could be

second, because it was a private and not a public debt."

"in a civil war," says Phillimore, "there could be no occupatio."

"A civil war," says Grotins, "is not of the same kind concerning which this law of nations was instituted." In a late case in North Carolina, where it was attempted to apply her principles of the "occupatio belica" to the sequestration, by acts of the insurgent State, of a debt due to a citizen of a loyal State, the court rejected the defence, and said:—"These acts did not effect, even for a moment, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offences against the State by resisting its officers and defying its authority can separate him from the State. Such acts may subject the offender to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

After this opinion of the Chief Justice let me read from the opinion of Mr. Justice Sprague, in the case of the Amy Warwick (24 Law Rep., 408):—"An objection to the prize decisions of the District Courts has arisen from an apprehension of radical consequences. It has been supposed that if the government have the rights of a beligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error; a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where peace could not have been known, is unanthorized, and property so taken is not prize of war, and must be restored. (Wheat, Elements of International Law, 612.) Belligerent rights cannot be exercised when there are no belligerent rights, may indeed survive the war. The holder of such title may permanently exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise of b

inhabitants of all pre-existing political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the constitution. In a civil war the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the power of any department beyond the limits prescribed by the organic law. That would be not to maintain the constitution, but to subvert it. Any act of Congress which would amult the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinance with which this atrocious rebellion commenced."

Thus, if the court please, have I gone over these four grounds; and I close what I have to say upon these subjects with a single example from the federal government itself. What did that government itself do as it advanced? I take its own act. Although the rebel capital was at Richmond, although the rebel flag was floating within sight of this Capital, you received Senators from Virginia in the hall of the Senate, and Representatives from Virginia intended to its civil government and entitled to be represented in Congress. This is the way in which you decaled with the country which you occupied.

received representatives elected by the services your lines.

Now, let me pass, if the court please, from the consideration of these four reasons, as they have been stated in debate, for the assumption by Congress of the government of the State of Mississippi, and as your attention to the particular reasons given by me learned triends who have argued on the other side. But before I do that let me turn aside for a momental process what I suppose was intended to be an as But to answer what I suppose was intended to be an gumentum ad hominem, but which I think entir fails in this place. This is the argument. The Pr dent at the close of the war declared there was quinentum ad hominem, but which I think entirely fails in this place. This is the argument. The President at the close of the war declared there was ne civil government in the rebel States, and proceeded to reorganize governments. The brief of one of the counsel is much occupied with the correspondence between the President and Secretary of State and the provisional governors, and the steps taken to govern the States provisionally. The answer to that argument is that we have nothing to do wish the action of the President on that subject, and whether the Executive was right or not, and whether he took a constitutional view of the case or not is makes no difference to us. But a further answer may be this—whether the provisional governments established under the authority of the Executive were legally established or not, they became de facule governments and were recognized by the people and were in possession of all the attributes of sovereignty; had legislative, judicial and executive departments and were going on as regularly as any States in the Union at the time these Reconstruction acts were passed; and therefore it would not advance the argument at all to show that the antecedent provisional governments were not wurranted by the constitution. I therefore pass over that argument because it has no piace here. It is enough for us that the governments of the States, were in operation. We know by the reports of the General of our army that order prevailed throughout the South before cause it has no piace here. It is enough for us it the governments of the States, were in operation when we have the control of the General of our arthat order prevailed throughout the South before these acts of Reconstruction were passed.

Now, if the court please, let me take up the programment of the court please, let me take up the programment of the court please. There were six of them:—

1. That Mississippi has no State government which is et tied to be recognized by the United States as a State of a Union; and that this has been determined by the political partments of this government.

2. That the decision so made is binding and conclusive up this court, notwithstanding the judges may think the decise erroneous.

this court, notwithstanding the judges may think the dechese erroneous.

8. That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in entablishing a republican State government for that State, and think as united States is now engaged in the performance of that toonstitutional duty.

4. That the grant of power to the United States to "guarantee a republican form of government" to the States of the Uniton, not being restricted by the constitution, as the means which may be employed to execute the power, Congress is the exclusive judge of what means are necessary in a given case. 5. That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by Congress for this purpose, violates no provision of the condition of the United States.

6. That insamuch as Congress entered upon the proceeding until Congress shall declare peace to be restored, exhall cease to exercise any belligerent right towards these States.

The first of these propositions is merely a seconclusion from other propositions, and need a separately considered. The fourth is met by have already said about the use of prohibited to secure an end, however constitutional and a ble that end might be. I have shown that m government is prohibited. Therefore, even first three and the sixth propositions were all ceded these military reconstruction acts could defended.

arst three and the scale and coded these military reconstruction has already been sufficiently and the sixth alone report of deserve particular attention; and even in reconstruction and the sixth, I have already shown that bellifyights cannot continue to be exercised unlewar can be prolonged by a fiction. The discort of these three propositions—that is, the first, and sixth—may be separated into four divises. It is Mississippi, in fact and in law, a Statunion, having regard only to the condition and war, without reference to the declaration. beilion and war, without reference to the declarat of the legislative and executive departments of government upon the question? In other words, the rebellion or the war, or both, put Mississippi, a State, out of the Union? 2. Is war, in fact and in law, still subsisting

the rebellion or the war, or both, put Mississippi, as a State, out of the Union?

2. Is war, in fact and in law, still subsisting between the United States on one side and the State er State government or people of Mississippi on the other side, without reference to the declaration of the legislative and executive departments of the government upon the question?

3. What has been the declaration of the legislative and executive departments upon these two questions?

4. What is the legal effect of such declaration?

Pirst—bid the rebellion or the war, or both, put Mississippi as a State of the Union?

Mississippi was a State of the Union once. When did see cease to be such? Was it when she adopted the ordinance of secession, on the 9th of January, 1861, before a shot had been fired? that is to say, did the act of renouncing her allegiance alone take her out of the Union? The day after that ordinance was passed was she a State in his Union or was she not? Suppose the Chief Justice had been sitting in a court at Jacksonville, or in the place where it was proper to hold the court in Mississippi, the day after the secession was declared, and a citizen of Mississippi, as a citizen of Mississippi, in the Circuit Court of the United States, would the Judge have been obliged to hold that there was no such person as a citizen of Mississippi? The jurisdiction of the Circuit Court of the courts in Mississippi, in longer judgments to be recognized in the other States in the Union no longer to be recognized in the other States in the Union of her party a citizen of Mississippi no longer judgments to be recognized in the other States of this Union? Were the judgments of the courts in Mississippi no longer judgments of the courts in Mississippi. Was a struly a State in the Union after secession as helofore.

When did war take the State out of the Union? Were the Judgments of the Union. In fact and in law, Mississippi was a struly a State in the Union after secession as before.

pretends that the act of secession carried the State out of the Union. In fact and in law, Mississippi was as truly a State in the Union after secession as before.

When did war take the State out of the Union? If war took the State out, then it must be it was by virtue of some right of war. I have already considered that, and shown, as I think, that neither by by right of belilgerents nor of conquest is any change made in the legal relation of the State to this Union, or to the other States of the Union.

But let me take the argument of my learned friend, and inquire what it is. This is his proposition:—That Mississippi has no State government which is entitled to be recognized by the United States as a State in this Union. Was there ever such confusion of ideas? Mississippi is not a State because she has no State government which is entitled to be recognized as a State! Did anybody ever suppose that a State government was entitled to be recognized as a State? The confusion is between the government and the State. The government is one thing, and the State another. A corporate body may exist under different forms of the governing body. There may be a State in this Union with a disloyal government. Governments change; sovereigns and dynastics appear and disappear; but the State remains and is immortal—the State is independent of all these changes. France under the Bourbons is the same France that she was under Napoleon, or when a republic, or under Napoleon III.; and the debts contracted by Louis XIV. were recognized by the republic as well as by the Monarchy. If you can biot out a State then she ceases; but she is not affected by any change whatever in her State government. New york might make this peaceful revolution a hundred times, so that she be still republican in form, and she would be still the same sovereign State.

Next, is war, in law and in fact, still subsisting between the United States on the one side and the State and people of Mississippi on the other, laying aside the declarations of the Execu

law.

But, thirdly, what has been the declaration of the legislative and executive departments of the govern-